Supreme Court, U.S.
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NO. 00-1739

In The

SUPREME COURT OF THE UNITED STATES

ERNEST A. JANIK, Jr., Individually, On behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik; LEAH EILEEN JANIK, Individually, On behalf of Grant Joseph Janik, On behalf of Tyler Newman Janik,
Petitioners

v.

AMICA MUTUAL INSURANCE COMPANY; NOBEL SERVICE CORPORATION; AND IAS CLAIM SERVICES, INC.
Respondents

On Petition for Writ of Certiorari to the United State Court of Appeals for the Fifth Circuit

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AMICA MUTUAL INSURANCE COMPANY'S BRIEF IN OPPOSITION

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ATTORNEYS FOR RESPONDENT

20 June 2001

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38 pp

QUESTION PRESENTED

1. Whether an abuse of discretion occurred by denying Plaintiffs' 60(b)(3) motion and Motion to Reconsider the denial of its 60(b)(3) motion.

LIST OF PARTIES

The parties to this case are:

Ernest A. Janik, Jr., Individually, On behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik; Leah Eileen Janik, Individually, On behalf of Grant Joseph Janik, on behalf of Tyler Newman Janik;

Amica Mutual Insurance Company;

Nobel Service Corporation; and

IAS Claim Services, Inc.

Pursuant to Rule 29.1, Respondent, Amica Mutual Insurance Company is a mutual company and is not publicly traded. Additionally, none of Amica's subsidiaries are publicly traded. Amica does not have a parent corporation.

ERIC G. WALRAVEN

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 2

Proceedings and Results 2

Statement of Facts 3

ARGUMENT 15

Whether an abuse of discretion occurred by denying Plaintiffs'Motions to set aside the trial court judgment based on fraud. 15

A.. Standard of Review 16

B. 60(b)(3) Motion and the Motion to Reconsider 18

1. It was not an abuse of discretion to refuse to set aside the judgment set aside because Amica allegedly concealed information that it is Number 1 in customer satisfaction, because

Plaintiffs presented no evidence that they ever made a discovery request that encompassed this information and they presented no evidence of how this alleged failure to disclose hindered trial preparation 19

2. It was not an abuse of discretion to refuse to set aside the judgment because Plaintiffs were "confused" about IAS' identity 20

3. It was not an abuse of discretion to refuse to set aside the judgment because of a delay in producing the recap notes since it is undisputed that Plaintiffs had the recap notes almost a year before trial. 22

4. It was not an abuse of discretion to refuse to set aside the judgment because AMICA failed to produce documents showing that Plaintiffs wanted their furniture 100% germ free, as there is no evidence that such documents exist. 22

5. It was not an abuse of discretion to refuse to set aside the judgment because AMICA failed to produce documents regarding generally acceptable claims handling practices or documents that demonstrated that it routinely gave the benefit of the doubt to the insured, as there is no evidence that such documents exist. 23

6. It was not an abuse of discretion to refuse to set aside the judgment because a defense expert testified outside the scope of his report 24

7. It was not an abuse of discretion to deny Plaintiffs' motion to reconsider because the motion to reconsider failed to meet the required heavy burden to set aside a judgment. 24

8. It was not an abuse of discretion to refuse to set aside the judgment because the alleged withholding of the complained of material deprived Plaintiffs' of their constitutional right to trial by jury. 25

CONCLUSION 27

TABLE OF AUTHORITIES

FEDERAL CASES *Page*

Anderson v. Cryovac, Inc., 862 F.2d 910 (1st Cir. 1988) .. 16

Chrysler Corp. v. Superior Dodge, Inc., 83 F.R.D. 179 (D. Md. 1979) 17, 19

Cutler v. Lewiston Daily Sun, 103 F.R.D. 172 (Me. 1984) 17

Government Financial Servs. One Ltd. Partnership v. Peyton Place, Inc., 62 F.3d 767 (5th Cir. 1995) 16

Harduvel v. General Dynamics Corp., 801 F. Supp. 597 (M.D. Fla. 1992) 17

MCI Telecommunications Corp. v. Matric Communications Corp., 171 F.R.D. 7, 9 (D. Ma. 1997), *aff'd.* 135 F.3d 27 (1st Cir. 1998) 17, 22

Ojedo-Toro v. Rivera-Mendez, 853 F.2d 25 (1st Cir. 1988) 17, 22

Rozier v. Ford Motor Co., 573 F.2d 1332 (5th cir. 1978) 16, 20

USM Corp. v. SPS Technologies, Inc., 694 F.2d 505 (7th Cir. 1982) 17

Washington v. Patlis, 916 F.2d 1036 (5th Cir. 1990) 21

Williams v. Time Warner Operations, Inc., 98 F.3d 179 (5th Cir.1996) 26

FEDERAL RULES

Fed. R. Civ. P. 26(a) 24

Fed. R. Civ. P. 34(c) 23, 24

Fed. R. Civ. P. 37(c) 24

Fed. R. Civ. P. 56(f) 26

Fed. R. Civ. P. 60(b)(3) 18, 21, 26

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AMICA MUTUAL INSURANCE COMPANY; NOBEL SERVICE CORPORATION; AND IAS CLAIM SERVICES, INC.

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On Petition for Writ of Certiorari to the United State Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION OF AMICA MUTUAL INSURANCE COMPANY

TO THE SUPREME COURT OF THE UNITED STATES:

Respondent, AMICA MUTUAL INSURANCE COMPANY, (Amica), Defendant-Appellee below, respectfully submits this Brief in Opposition in response to the Petition for Writ of Certiorari filed by ERNEST A. JANIK, JR., et. al., (Janik), Plaintiff-Appellant below.

STATEMENT OF THE CASE

A. *Proceedings and Results*

This case arises from multiple personal injury and property damage claims asserted by Plaintiffs against the City of Dallas, AMICA, IAS, and Nobel based on sewage flooding on their property (R. Vol. 1, p. 1-53).

The district court granted summary judgment to AMICA on Plaintiffs' causes of action for DTPA violations, coercion and duress, breach of fiduciary duty, breach of quasi contract and unconscionable contract, (R. Vol. 48, P. 559), and to IAS on Plaintiffs' causes of action for conspiracy and unconscionable contract.

The remaining claims against AMICA, IAS, and Nobel were tried to a jury. The jury rejected all of Plaintiffs' claims except one. (R. Vol. 53, p. 5900-17). When asked whether AMICA and/or IAS failed to acknowledge with reasonable promptness pertinent communications with respect to claims arising under the policy, the jury answered affirmatively as to both (R. Vol. 53, p. 5915). Thereafter, the jury apportioned responsibility for causing Plaintiffs' damages as 25 percent attributable to AMICA and 75 percent attributable to IAS (R. Vol. 53, p. 5919). The jury then awarded Plaintiffs out-of-pocket damages for costs to clean consumer goods of $2,815.73 (R. Vol. 53, p. 5922).

Because the liability finding bore no relationship to the damages award, the court entered judgment in favor of AMICA and IAS, and dismissed all of Plaintiffs' claims against them with prejudice (R. Vol. 53, p. 5927, R. Vol. 54, p. 6197, T. Vol. 83, P. 14-15).

Plaintiffs filed a number of post-trial motions including a request that the court alter the JNOV (R. Vol. 53, p. 5928), and two requests for a new trial. All of Plaintiffs' post-trial motions were denied (R. Vol 53, p. 6673-74, R. Vol 54, p.

6197-99). Ten days after the entry of judgment, in an abundance of caution, AMICA and IAS made a renewed motion for judgment as a matter of law (R. Vol. 53, p. 404). The court denied that motion as moot in light of its denial of Plaintiffs' Motion to Alter the JNOV and Plaintiffs' Second Motion for New Trial (P. R. Ex. Tab. L).

On Nov. 19, 1998, Plaintiffs perfected an appeal of the trial court judgment to the Fifth Circuit. On Aug. 30, 1999, while the first appeal was pending in the Fifth Circuit, Plaintiffs filed a 60(b)(3) motion seeking to set aside the trial court judgment based on fraud. On October 28, 1999, the district court denied the 60(b)(3) motion. (App. A-12 -A-18) On Nov. 15, 1999, Plaintiffs filed a Motion to Reconsider the Plaintiffs 60(b)(3) motion, which was denied by the district court. (App. A-19) The Fifth Circuit affirmed the district court's ruling and adopted its opinion. (App. A-1 - A-3).

B. *Statement of Facts*

This lawsuit stems from Plaintiffs' dissatisfaction with the handling of a property claim under a renter's policy issued by AMICA and adjusted by IAS. Plaintiffs filed the claim following a sewer backup that partially flooded their rented home. Although AMICA paid the unscheduled personal property (UPP) damage limits under the policy (Vol 3b, 34), Plaintiffs had a laundry-list of complaints regarding the handling of the claim.

The IAS adjusters who worked with the Plaintiffs described Janik as "difficult." (T. Vol. 6, 173) Janik would not respond to requests for meetings, would not accept offers of help and kept issuing contradictory instructions to the adjusters (T. Vol. 6, 26; T. Vol. 7A, 4-9; T. Vol. 6, 108, 110, 112, 129; T. Vol. 3b, 3-4; D. Ex. 1-E; D. Ex. 1-F). In fact, Blackmon Mooring, the company hired by Plaintiffs to move, store and clean their furniture, described Janik's demands as impossible (T. Vol. 6, 30, 33, 77, 207-208). Their observation is supported

by the record, which shows that Janik took his furniture to three different companies for cleaning, and he was not satisfied with the work of any of three companies (T. Vol. 3b, 45-47).

The claim arose on Sunday, October 31, 1993, when Plaintiffs returned to their rented home to discover that portions of it were flooded with dirty water (T. Vol. 1C, 10). Plaintiffs did not notify AMICA of the claim on Sunday, even though adjusters would have been available (T. Vol. 6, 198-199).

The dirty water turned out to be city sewage, but Plaintiffs asserted they did not realize it was sewer water for several hours (T. Vol. 1 C, 10, 13). In any event, the Plaintiffs and their oldest son spent the afternoon and evening cleaning up their home both before and after discovering the water was sewer water (T. Vol. 1C, 14-15; T. Vol. 2, 197-99, 201).

On Monday morning, Janik called Blackmon Mooring to come and assist him in cleaning his personal property (T. Vol.2, 205-206; T. Vol. 4b, 3). Blackmon Mooring came out that day to assess the damage (T. Vol.2, 205-206).

He also called AMICA on Monday and verbally notified Amica of the claim. (T. Vol. 2, 206; T. Vol. 6, 199). AMICA immediately referred the claim to IAS, an independent claims adjusting service used by AMICA (T. Vol. 6, 199-201). IAS opened its file the next morning, Tuesday, and the adjuster, Jene Montague, called Janik on Tuesday morning to set up an appointment to tour the house (T. Vol. 2, 207; T. Vol. 4b, 6-7; T. Vol. 6, 5).

Montague arrived at the house at approximately 2:30 p.m. on Tuesday, the day after AMICA received notice of the claim (T. Vol. 1, 25; T. Vol. 2, 207). A Blackmon Mooring representative was at the house when Montague arrived (T. Vol. 4b, 8).

According to Montague, Janik told him that Blackmon Mooring was preparing estimates of what it would cost to clean and repair the property (T. Vol. 6, 7-8). Montague says that he told Janik that in his opinion the furniture would have to be moved out of the house so that the homeowner could make

repairs to the house (T. Vol. 6, 8, 10-11), and he told Janik that he would call AMICA and see if AMICA would agree to pay for a pack-out (T. Vol. 6, 9). He denies telling Janik that he could not move his furniture out of the house (T. Vol. 6, 9).

On Wednesday morning, Blackmon-Mooring removed furniture that had been standing in water (T. Vol. 1, 55; T. Vol. 2, 209; T. Vol. 3b, 5). Janik says that he was surprised by this but was told by the Blackmon Mooring representative that IAS had said it was okay (T. Vol. 1, 55).

Also on Wednesday morning Greg Upah, a former restaurant worker, turned car salesman, turned environmental consultant, with no scientific degree (Vol 3b, 5; T. Vol. 5b, 3, 27-28) visited the house at Janik's request (T. Vol. 1c, 60; T. Vol. 2, 208). After taking air samples, Upah warned Janik that the house was unsafe causing Janik to become frightened for the health of his family (T. Vol. 1c, 60).

On Thursday, Janik received testing results from Upah indicating that the kitchen floor contained asbestos particles (T. Vol. 1c, 68; T. Vol. 3b, 8). According to Janik when he called Montague on Friday morning to tell him about the asbestos, Montague told him he had better move out of the house because Montague did not want a total loss under the policy (T. Vol. 1c, 69; T. Vol. 3b, 8). Janik claims that he perceived this as a threat to either move out of the house or he would not get the money coming to him under the policy (T. Vol. 1c, 70-71).

Montague's account differs. He says that he told Janik on Thursday morning that AMICA had agreed to pay for the pack-out (T. Vol. 6, 14). During that conversation, Janik told Montague that Janik had hired Upah, and Montague told Janik that AMICA would not pay for Upah (T. Vol. 6, 16). It is undisputed that on Thursday afternoon, Janik sent Montague a fax thanking him for his excellent service (D. Ex. 1-C).

According to Montague, Janik did not tell him about the asbestos discovery until Friday, the day after Montague told Janik that AMICA would pay for a pack- out (T. Vol. 6, 15). At that time, Janik also told Montague that Blackmon Mooring

would begin removing his property from the house (T. Vol. 6, 15). Montague says that he also told Janik that because of Janik's concerns regarding the contamination, Blackmon Mooring would hire a specialist to run tests to determine if the furniture was repairable or if it would have to be replaced (T. Vol. 6, 16). There was no evidence in the record that Janik objected to hiring the chemist. Montague denies threatening Janik (T. Vol. 6, 17).

On Friday, Janik signed a contract with Blackmon Mooring backdating the contract to Wednesday, because he believed that he had to backdate the contract for the insurance to cover the pack-out (T. Vol. 1C, 70; T. Vol. 2, 210-211; D. Ex. 1-B). The contract provided that AMICA was to pay Blackmon Mooring directly (D. Ex. 1-B), but Janik subsequently rescinded those instructions (T. Vol. 6, 212-213).

Blackmon Mooring spent all day Saturday and Monday packing out the house (T. Vol. 1C; T. Vol. 3b, 9-10). Janik's furniture and belongings were all out of the house on Monday, eight days after the sewer back-up.

On Nov. 9, Janik called Montague and asked for an advance under the ALE section of the policy and also asked for a copy of the Blackmon Mooring bid (T. Vol. 6, 20). Montague promptly responded to this communication by checking the next day with Blackmon Mooring regarding the status of the estimate. He was told the estimate was incomplete (T. Vol. 6, 20). On Nov. 12, Montague sent a report to AMICA recommending that it hire an independent chemist to evaluate the contamination of Janik's property because of the disagreement between Blackmon Mooring and Janik regarding whether the property could be restored (T. Vol. 6, 20-21; D. Ex. IT 73). AMICA agreed (T. Vol. 6, 75-76, 205-206), so on the 15th, Montague directed Blackmon Mooring to hire a chemist (Vol 6, 23). AMICA was not involved with the selection of the chemist (T. Vol. 6, 205). At that time, Montague was told by Blackmon Mooring that some items had been test-cleaned and would be returned to Janik (T. Vol. 6, 25).

On Nov. 15, Blackmon Mooring delivered its estimate and asked Janik for approval to begin cleaning the property (T. Vol. 4b, 12) (D. Ex. IT-65). Janik, however, did not give Blackmon Mooring permission to proceed (T. Vol. 4B, 15) (Ex. 1-D). In fact, Janik never gave Blackmon Mooring permission to clean the property (T. Vol. 4b, 19).

On Nov. 19th, Janik went to the IAS offices to pick up the $2,000 advance check that AMICA agreed to pay even though such an advance was not provided for under the policy terms (T. Vol. 6, 25). At the office, Janik and Montague discussed Blackmon Mooring's cleaning estimate and the additional testing (T. Vol. 6, 25). Janik said he wasn't sure he wanted the property cleaned (T. Vol. 6, 25).

Montague also told Janik that AMICA needed additional information regarding the destroyed property listed on the earlier inventory before the claim could be paid (T. Vol. 6, 25-26). Montague then introduced Janik to Debbie Allen of IAS and told him she would be available to assist him in completing the forms (Vol 1C, 82-82; T. Vol. 6, 26; T. Vol. 7A, 4-5). Although Allen made repeated efforts to contact Janik regarding completing the forms, he never responded to the offers of assistance (T. Vol. 7a, 5-9)(D. Ex. IT 66).

On Nov. 21, Janik sent Montague a fax thanking him for the advance and saying he would not make any recommendations until he reviewed the chemist report (T. Vol. 3b, 14; T. Vol. 6, 27) (Ex. D. 1-D). On Nov. 30, Blackmon Mooring told Montague that it still did not have the chemist report (T. Vol. 6, 28). Again on Dec. 6, Blackmon Mooring told Montague that it still did not have a written report from the chemist, but that the tests showed heavy contamination on the items that had actually been in the flood water, but only light to moderate contamination on other items (T. Vol. 6, 28).

On Dec. 13th, Montague again spoke with Blackmon Mooring who expressed concern about Janik's demands. According to Blackmon Mooring, Janik wanted assurances that the property would be 100% germ-free (T. Vol. 6, 30).

Blackmon Mooring told Montague that it wanted to test clean some of the property to see how it worked, but that Janik was reluctant to proceed (T. Vol. 6, 28-29). Again Blackmon Mooring told Montague that it only had a verbal report from the chemist, but promised to try to get a written report as soon as possible (T. Vol. 6, 28).

On Dec. 14th, a Blackmon Mooring representative met with Montague to discuss the claim and asked for a meeting with AMICA and IAS to discuss Janik's demands (T. Vol. 6, 30). Montague says he believed that Blackmon Mooring wanted the meeting because it was concerned that it would clean the property, but that Janik would refuse to accept it, leaving Blackmon Mooring with the bill (T. Vol. 6, 30). Montague says there was no discussion of Janik attending the meeting one way or the other (T. Vol. 6, 31, 32).

The other participants in the meeting, David Terry of IAS and Tom Ferris of AMICA, concurred that Blackmon Mooring requested the meeting and that they made no effort to conceal the meeting from Janik (T. Vol. 6, 76-77, 79-80, 206-207). The IAS log book, however, has a scratch out on the list of participants (Pl. Ex. 442). Janik claimed that scratch out was his name and indicated he was deliberately excluded from the meeting (T. Vol. 2, 111-114).

On December 15, Janik sent instructions to IAS retracting his authorization for direct payment to Blackmon Mooring and requiring his signed approval before any Blackmon Mooring invoice could be paid (T. Vol. 2, 212-213; D. Ex. 18). Janik testified at trial that he became dissatisfied with Blackmon Mooring after visiting its facility because he thought it was not taking proper care of his belongings and because its workers used bad language (T. Vol. 1c, 80).

On Dec. 22, IAS, AMICA and Blackmon Mooring met to discuss the claim (T. Vol. 6, 32). At that time, Blackmon Mooring told AMICA and IAS that the chemist could not give assurances that the items would ever be completely cleaned to the point of being 100% germfree, which was what the Janiks

wanted (T. Vol. 6, 33, 77, 207-208). Following the meeting, David Terry of IAS drafted a report outlining three options: 1) clean everything and if Janik would not accept it, then work it out with him; 2) test clean a few samples and see how the samples came out; 3) declare a total loss and tender the limits (T. Vol. 6, 76; D. Ex. IT 76). After reviewing the report, AMICA's Tom Ferris said that he decided to pay the limits, believing it was the only thing that would satisfy Janik (T. Vol. 6, 210).

On Dec. 23, Janik sent a fax to Rick Mandel of Blackmon Mooring requesting a copy of the chemist report, among other items (T. Vol. 6, 33; P. Ex. 267-A). He addressed the fax to Rick Mandel, and copied it to Montague. Montague testified he did not interpret the fax as asking him for anything, because it was addressed to Blackmon Mooring (T. Vol. 6, 33-34), and because he thought Janik already knew the results (T. Vol. 6, 34).

On Jan. 3rd, Janik sent another fax addressed to both Blackmon Mooring and Montague asking for a response to the Dec. 23 fax (T. Vol. 6, 34-35; P. Ex. 268-A). Once again, because the letter was addressed to Blackmon Mooring, Montague did not think the letter was requesting anything from him (T. Vol. 6, 35).

Blackmon Mooring sent the chemist report to Janik on Jan. 11, but left off Exhibit A to the report (T. Vol. 3b, 15; T. Vol. 6, 35). On Jan. 12, Janik sent a fax to Montague asking him for Exhibit A (T. Vol. 6, 35; D. Ex. 268-A). Montague then faxed a letter to AMICA asking if he could send Exhibit A to Janik, to which AMICA immediately responded "Absolutely" (T. Vol. 6, 36-37; Ex. 268-F, 522-E, IT-74). On Jan. 14, Montague faxed the report to Janik (T. Vol. 6, 38).

AMICA's Tom Ferris testified he assumed all along that the Janiks had the test results (T. Vol. 6, 211), and he was surprised in January to learn that they did not (Vol 6, 211). Ferris further testifed he never told anyone to hide the test results from the Janiks (T. Vol. 6, 206). Likewise, Montague

said he did not realize Janik did not know about the chemist's testing results because when the meeting with the Blackmon Mooring representatives took place, the Blackmon Mooring representative talked about his and Janik's discussions (T. Vol. 6, 29).

On Jan. 14, Montague also told Janik that AMICA was ready to make a payment decision but that AMICA needed a final contents and damage listing and ALE documentation (Vol 6, 39; Ex. 268-E). After receiving a Jan. 17 fax from Janik (T. Vol. 6, 39), Montague called AMICA and asked if all the personal property was to be considered a total loss (T. Vol. 6, 39-40).

AMICA responded with a fax that it was willing to consider any items that had not been cleaned a total loss and that it would consider the cleaned items a total loss as well, if Janik was not satisfied with the level of cleanliness, but that it needed itemization (T. Vol. 6, 40; D. Ex. IT 75). On Jan. 20, Montague left Janik a voice mail saying that AMICA had decided to total all personal property, but that AMICA needed itemized documentation and that IAS would be happy to assist him in completing the documentation (T. Vol. 6, 41-43; D. Ex. IT 69).

A few days later, Montague stopped working on the claim because he was sent to California to adjust claims arising from the North Ridge earthquake (T. Vol. 6, 44). Terry then took over handling the claim for IAS (T. Vol. 6, 80-81).

On Feb. 8, at 7:30 a.m., Janik sent a fax to IAS and AMICA directing them to pay certain Blackmon Mooring invoices, but only subject to AMICA resolving Janik's problems with the Blackmon Mooring invoices (T. Vol. 3b, 17-18; T. Vol. 6, 88; D Ex. 1-E). One of the invoices that Janik directed to be paid was invoice number 497, dated Dec. 23, 1993, in the amount of $2,815.73 (D. Ex. 1E; D. Ex. 3B). The same morning, Janik sent another fax to AMICA asking AMICA to pay Blackmon Mooring *appropriately as soon as possible* (T. Vol. 3b, 18-19; Ex. 1F). Again he asked AMICA for help resolving his billing dispute with Blackmon Mooring (T. Vol.

3b, 19).

Terry responded to these faxes by contacting Blackmon Mooring in an attempt to resolve the open issues (T. Vol. 6, 87-88, 90; D. Ex. IT-70; D. Ex. IT 78). On Feb. 9, he made a report to AMICA discussing the stalemate between Janik and Blackmon Mooring (T. Vol. 6, 89-91; D. Ex. IT 78).

On Feb. 15, Janik again sent two faxes regarding payment to Blackmon Mooring. The first was addressed to David Terry and Valerie DeShotel asking AMICA to pay the *proper* amount to Blackmon Mooring (T. Vol. 3b, 20; Ex. D 1-G). He sent a second fax to David Terry asking that Blackmon Mooring be paid the proper amounts (T. Vol. 3b, 21; Ex. D 1-H).

On Feb. 15, Janik and Terry talked on the phone regarding the problems with Blackmon Mooring and payment of the claim. Janik recorded the conversation without Terry's knowledge (T. Vol. 44b, 36-42; T. Vol. 6, 92; D. Ex. IT-70). Terry told Janik that his efforts to resolve Janik's dispute with Blackmon Mooring were unsuccessful and that IAS and AMICA did not know what else they could do to assist Janik with his dispute, but that if Janik suggested something, they would be willing to pursue his suggestion (D. Ex. IT 70). Terry also explained that AMICA could make the draft for the Blackmon Mooring bill payable to both Janik and Blackmon Mooring jointly and that would protect Janik's interests and give him leverage to settle his dispute with Blackmon Mooring since Blackmon Mooring could not cash the check without Janik's signature (T. Vol. 4b, 36-42; T. Vol. 6, 92-93). Terry told Janik that AMICA did not care how the checks were cut and was willing to comply with Janik's wishes (T. Vol. 4b, 36-42; T. Vol. 6, 95-96). Janik directed Terry to cut the check jointly (T. Vol. 4b, 41; T. Vol. 5a, 4; D. Ex. IT 70). He also told Terry that he was worried about out of pocket charges from Blackmon Mooring, and Terry told him that would not happen, but if it did to call Terry and he would handle it (D. Ex. IT-70, p 3).

Terry says that when the conversation concluded, he

thought that Janik agreed the proper way to proceed was to issue two checks (T. Vol. 6, 93). Janik admitted that at the time he was talking to Terry, he agreed with Terry's suggestion to have a joint draft, but that subsequently he changed his mind (T. Vol.4b, 41; T. Vol. 5a, 4).

On Feb. 19, Janik sent another fax asking that AMICA issue a check in the *proper* amount to Blackmon Mooring (T. Vol. 3b, 22-23; Ex. D. 1-I). Terry then picked up the two drafts from AMICA and left a message for Janik telling him the drafts were ready (T. Vol. 6, 93-94). On Feb. 21, he also advised Janik by letter that two drafts were ready (T. Vol. 3b, 24-25; D. Ex. J). Janik responded by sending Terry a fax saying that Janik did not agree with the way the payment was being made and that he resented the telephone tactics (T. Vol. 6, 94; D. Ex. 1H). He then reversed his prior directions to Terry and said he wanted Blackmon Mooring paid directly (T. Vol. 6, 101).

This was the third time Janik changed his instructions regarding how to pay Blackmon Mooring. His original contract with Blackmon Mooring authorized direct payment (D. Ex. 1-B), then he retracted the agreement for direct payment (T. Vol. 3b, 3-4; Ex. 18). He directed IAS to pay certain invoices, then rescinded that order the same day (D. Ex. 1E, D Ex. 1F). Finally, Janik specifically directed IAS to cut a joint draft for the payment of Blackmon Mooring and then when his wishes were followed, he reversed himself again (D. Ex. IT 70, D. Ex. IH).

On Feb. 21, Terry sent a letter to Janik saying he did not understand the fax since he thought Janik was in agreement regarding issuance of the joint draft for $15,889.65 and that he contacted Blackmon Mooring and they had the property ready for pick-up (Vol. 6, 98). He also told Janik that AMICA was ready to pay the balance. The letter also asked Janik to let Terry know how Janik wanted to proceed on the Blackmon Mooring draft (T. Vol. 6, 99).

On Feb. 21, 1999, Terry made another report to AMICA in which he discussed Janik's about face on issuing the joint

draft for payment of Blackmon Mooring's invoice (T. Vol. 6, 99; D. IT 79). AMICA then decided to issue one check to Blackmon Mooring for $15,889.65 and another check to the insured for $44,000, but because there was a dispute between the insured and Blackmon Mooring, AMICA said it needed a signed proof of loss before IAS released the drafts (T. Vol. 6, 101-102). AMICA then reissued the draft for $15,889 payable to Blackmon Mooring only (T. Vol. 6, 101).

AMICA's Tom Ferris testified that once Janik requested the deletion of his name from the $15,889.65 draft, then AMICA needed the proof of loss as evidence of Janik's authority to AMICA to pay the claim directly to Blackmon Mooring (T. Vol. 6, 212). He said AMICA never intended to deny the claim unless the proof of loss was provided, nor was the proof of loss considered an end to the claim (T. Vol. 6, 212). Ferris said the proof of loss would act as a receipt for the money paid and as an acknowledgment by the insured that he knows where the money is going (T. Vol. 6, 213). In this case, the acknowledgment was important because of Janik's dispute with Blackmon Mooring regarding the amount of its invoices (T. Vol. 6, 213). Ferris also explained that he didn't pay the Janiks the $44,000 figure because that amount would vary depending on what was owed to Blackmon Mooring (T. Vol. 6, 229).

On Feb. 23, Terry sent a letter to Janik telling him that based on his instructions AMICA had issued a check for $15,889 to Blackmon Mooring only and a check to him and his wife for $44,110.35 ($60,000 minus 15,889) (Vol 3b, 26-27; T. Vol. 6, 102; Ex. 1-K). Terry also enclosed a proof of loss form and asked Janik to sign and return it, saying that as soon as Terry received the signed proof of loss, the drafts would be released (T. Vol. 6, 103).

On Feb. 24, Janik sent a letter to Terry complaining about his piecemeal approach to the claim, complaining that Janik's requests were being ignored, requesting a full written evaluation of Janik's losses and demanding to know when he could pick up his property (T. Vol. 3b, 30-31; Vol 6, 104; Ex.

D 1-L). Terry responded the next day by telling Janik he could pick up his property whenever he wanted as Blackmon Mooring was willing to release it as soon as it received payment (T. Vol. 3b, 32; Ex. D1-M). Terry also explained he had not yet evaluated the ALE claim because he did not believe he had all the expenses (T. Vol. 6, 104). He again reiterated that AMICA was ready to deliver the drafts upon receipt of the proof of loss and he again explained to Janik that AMICA's policy did not provide coverage for medical expenses (T. Vol. 3b, 32-33; T. Vol. 6, 105-107).

On Feb. 28, Janik sent Terry a letter again complaining about Terry's failure to respond on the ALE claim (Vol 3b, 34-36; T. Vol. 6, 107-108; Ex. D 1-N). On March 2, Terry wrote Janik and explained that Terry hadn't responded on the ALE claim because he did not think he had all the expenses and he also asked Janik to call him regarding the ALE claim (T. Vol. 3b, 36-37, Vol 6, 108; Ex, D 1-O). Janik never responded to Terry's request for a phone call (T. Vol. 6, 109). Terry again told Janik the drafts were ready to be released as soon as the proof of loss was signed and that signing the proof of loss would not affect his ALE claim (T. Vol. 3b, 36-37; T. Vol. 6, 108-109).

On March 7, Terry sent Janik another letter telling him he didn't understand and couldn't read some of the documentation submitted in support of Janik's ALE claim and again asking for a meeting so they could review the information together (T. Vol. 3b, 38-39; T. Vol. 6, 110; Ex. D 1-P). Janik never responded (T. Vol. 6, 112).

In the March 7 letter, Terry again stated the two drafts were ready and would be released to Janik as soon as IAS received the proof of loss (T. Vol. 3b, 39; T. Vol. 6, 110-111). On the same date, Terry forwarded his fourth report to AMICA regarding the handling of the claim and explained his difficulty getting documentation from Janik regarding the ALE claim (T. Vol. 6, 112-113; D Ex. IT 80). AMICA responded that Terry should work up the claim as best he could so that AMICA could

get the claim paid (T. Vol. 6, 114).

After reviewing the ALE documentation, Terry sent a letter to Janik on March 9 outlining what expenses Terry thought would be covered under the ALE and enclosing a proof of loss for the ALE (T. Vol. 6, 127-129). Terry again offered to discuss the claim with Janik (T. Vol. 6, 129).

On March 9, Terry made another report to AMICA (T. Vol. 6, 132; D. Ex. IT 81). In that report, Terry noted that after reviewing the policy, he thought the proof of loss provision may have been waived (T. Vol. 6, 133). He then recommended that AMICA forget about the proof of loss, because the claim wasn't moving and AMICA was a company that always gave the insured the benefit of the doubt anyway (T. Vol. 6, 133).

During his testimony, Janik noted that one draft of the March 9 report discussed waiver of the proof of loss provision and one draft did not (T. Vol. 2, 81). Terry said the draft containing the discussion of the waiver was the one that went to AMICA, because he specifically wanted to include it as an issue (T. Vol. 6, 133-134).

On March 21, Terry sent Janik another letter saying AMICA was ready to pay both the UPP claim and the ALE claim upon receipt of the proofs of loss (T. Vol. 3b, 40; T. Vol. 6, 134-135; Ex. D 1-Q). On that day, Terry also sent another report to AMICA telling AMICA that Janik had requested another advance and that Janik had paid Blackmon Mooring himself (T. Vol. 6, 135-137; D IT 83). As soon as AMICA heard that all of the money would go to Janik, it told Terry it no longer needed the proof of loss and directed payment to Janik immediately (T. Vol. 6, 138, 218).

On March 23, AMICA mailed a Janik a $60,000 draft (T. Vol. 1C, 92; T. Vol. 3b, 40-41; T. Vol. 6, 139-140; D. Ex. 1-R). He also sent Janik a check for $1,020.42 for additional living expenses and said that he would be sending a check for $115.16 for Janik's film developing costs (T. Vol. 3b, 41).

On March 28, Terry again wrote to Janik offering to meet with him if he had any questions regarding the ALE claim

(T. Vol. 6, 140-141). In April AMICA's branch manager met with Janik in an effort to resolve Janik's unhappiness regarding the claims handling (T. Vol. 6, 219-220). The attempt at resolution was unsuccessful.

After Janik picked up his property from Blackmon Mooring, he took it to Restoration Specialist, but he wasn't satisfied with its work either (T. Vol. 3b, 45-47), so he took some of the property to a third cleaning specialist and he threw the remaining property away (T. Vol. 3b, 45-47).

ARGUMENT

I. Whether an abuse of discretion occurred by denying Plaintiffs' Motions to set aside the trial court judgment based on fraud.

A. Standard of Review

Appellate courts review a trial court's denial of a 60(b)(3) motion for abuse of discretion. *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1346 (5th Cir. 1978). Rule 60(b)(3) permits a court to "relieve a party ...from a final judgment...for....fraud...misrepresentation, or other misconduct of an adverse party...." Fed. R. Civ. P. 60(b)(3). A party seeking to set aside a judgment on these grounds, however, must meet the following standard: he must demonstrate by clear and convincing evidence that 1) the adverse party engaged in fraud or other misconduct; 2) he must show that the misconduct foreclosed full and fair preparation or presentation of his case. *Government Financial Servs. One Ltd. Partnership v. Peyton Place, Inc.*, 62 F.3d 767, 772 (5th Cir. 1995); *Rozier v. Ford Motor Co.*, 573 F.2d at 1339. As with all defects in the course of litigation, in order to warrant relief, he must show that the

error was harmful–it must have affected the substantial rights of the movant. *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 924 (1st Cir. 1988)(citing Federal Rule of Civil Procedure 61).

If the motion is based on the movant's allegation that the adverse party concealed evidence during the discovery process, then the movant must show that the concealed evidence substantially interfered with his ability to prepare for trial. *Id.* Substantial impairment may be shown by establishing the material's likely worth as trial evidence or by elucidating its value as a tool for obtaining meaningful discovery. *Id.* at 926. It may exist if a party shows that the concealment precluded inquiry into a plausible theory of liability, denied it access to evidence that could have been probative on an important issue or closed off a potentially fruitful avenue of direct or cross examination. *Id.* at 925. In other words, the allegedly concealed information must be materially related to the primary issue. *See MCI Telecommunications Corp. v. Matrix Communications Corp.*, 171 F.R.D. 7, 9 (D. Ma 1997), *aff'd.*, 135 F.3d 27, 34 n.13 (1st Cir. 1998).

Moreover, the movant must have actively concealed information during the discovery process. Fraud in responding to discovery is more than simply putting opposing counsel to the burden of getting a discovery order. *USM Corp. v. SPS Technologies, Inc.*, 694 F.2d 505,509 (7th Cir. 1982). Additionally, no fraud exists where the allegedly withheld documents were never specifically requested nor diligently sought. *Chrysler Corp. v. Superior Dodge, Inc.*, 83 F.R.D. 179, 195 (D. Md. 1979). Finally, a narrow or precise answer to the question actually asked and the failure to volunteer more information does not constitute misconduct. *Harduvel v.*

General Dynamics Corp., 801 F. Supp. 597, 608-09 (M.D. Fla. 1992).

Lastly, a movant may not be entitled to relief where the alleged misconduct was discovered in time to oppose it, since the actual cause of the adverse judgment is not the alleged misconduct but the movant's failure to act. *Cutler v. Lewiston Daily Sun* 103 F.R.D. 172, 174-75 (Me. 1984)(relief not warranted where the cause of an adverse summary judgment was not defendant's misstatement in its motion for summary judgment that certain facts were undisputed, but plaintiff's own failure to timely file written objections.) *See also Ojedo-Toro v. Rivera-Mendez*, 853 F.2d 25, 29 (1st Cir. 1988)(party cannot prevail on a 60(b)(3) motion where movant had knowledge of alleged misconduct.)

B. 60(b)(3) Motion and the Motion to Reconsider

Plaintiffs sought to set aside the judgment because of the following acts of alleged "fraud": 1) Amica allegedly withheld documentary evidence that it was number one in customer satisfaction; 2) IAS allegedly gave Plaintiffs confusing information regarding its identity; 3) Amica and IAS allegedly delayed in producing recap notes; 4) AMICA and IAS failed to produce any documentary evidence that Plaintiff Ernest Janik wanted his furniture 100% germ-free; 5) AMICA and IAS failed to produce any documentary evidence regarding acceptable claims handling procedure or that AMICA routinely gave the benefit of the doubt to its insureds; 6) a defense expert allegedly testified outside the scope of his expert report.

Although Plaintiffs complain that they were unable to prepare for trial because of Amica's and IAS's gamesmanship during discovery, Plaintiffs never asked for most of the material

they subsequently complained they didn't receive. Any material they asked for and did not receive was the subject of a timely objection by Amica. Plaintiffs did not bring any motions to compel against Amica during the entire eighteen-month discovery period (Exhibit "A" and Exhibit "B" to Amica's Response to Plaintiff's Motion for Relief from Judgment[1]). Assuming that Plaintiffs believed Amica was being obstreperous in its discovery responses, then they should have filed a motion to compel discovery, rather than wait until they received an adverse judgment and then cry foul.

Plaintiffs also complain they were surprised by some of the testimony at trial. Yet, Plaintiffs did not take a single deposition of a defense fact witness nor of a defense expert witness prior to trial. (Exhibit "A" and Exhibit "B" to Amica's Response to Plaintiff's Motion for Relief from Judgment) Undoubtedly, Plaintiffs were surprised by some of the testimony at trial. This surprise, however, did not result from Amica's "gamesmanship." It was caused solely by Plaintiffs' lackadaisical approach to trial preparation.

1. **It was not an abuse of discretion to refuse to set aside the judgment set aside because Amica allegedly concealed information that it is Number 1 in customer satisfaction, because Plaintiffs presented no evidence that they ever made a discovery request that encompassed this information and they presented no evidence of how this alleged failure to disclose hindered trial preparation.**

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[1] Record references are not available for the 1999 district court actions.

Plaintiffs' complain that defense witnesses testified during trial that Amica was number one in consumer satisfaction and that they were not given this information during the discovery process. First, as the district court noted, the Plaintiffs did not produce any evidence that they made a discovery request that encompassed this information. *See Chrysler Corp. v. Superior Dodge*, 83 F.R.D. at 195. Amica was under no obligation to provide information about consumer happiness with its services unless such information was the subject of a proper discovery request and relevant to the lawsuit. Without evidence that Plaintiffs made such a request, Plaintiffs cannot establish misconduct by clear and convincing evidence.

Additionally, no evidence existed that the alleged withholding of information about Amica's high level of customer satisfaction in any way impaired Plaintiffs' ability to prepare for trial. *See Rozier v. Ford Motor Co.*, 573 F.2d at 1339 (must show misconduct prevented full litigation of the case). The alleged evidence that Amica is the highest-rated insurance company in the land would not have helped Plaintiffs in their quest to establish Amica as uncaring and bullying. It would not have helped in their quest for punitive damages. This information would not have established a theory of liability nor did it foreclose an avenue of cross-examination.

As the district court observed, Plaintiffs acknowledged that they had information in their possession regarding consumer complaints regarding Amica's services, but they chose not to use this information to cross-examine Amica's witnesses because it was a timed trial. In essence, Plaintiffs admit that it was their own litigation strategy that stopped the cross-examination, not any alleged misconduct on the part of

Amica. In retrospect, Plaintiffs may regret some of their decisions regarding strategy, but those decisions were not due to the misconduct of Amica and IAS and cannot be used to set aside the judgment.

2. It was not an abuse of discretion to refuse to set aside the judgment because Plaintiffs were "confused" about IAS' identity.

Plaintiffs failed to establish by clear and convincing evidence any misconduct with regard to the identity of IAS. The only evidence that Plaintiffs pointed to as evidence of misconduct in this regard was Exhibit "B" to their first motion, which was a copy of letter from IAS counsel to Plaintiffs' counsel outlining the corporate history of IAS. Plaintiffs did not produce any evidence that this corporate history was incorrect. Instead, their sole contention was that it was confusing. Plaintiffs' confusion over evidence does not justify a new trial.

Plaintiffs' Exhibit "B" shows that IAS has undergone several corporate reorganizations, acquisitions etc. with accompanying name changes. This is not unusual in today's business environment. The footnotes in the letter indicates each of the representations was backed up by reference to an official document. Plaintiffs did not alleged any of these documents were incorrect. Because Plaintiffs have not produced any evidence of misconduct with regard to IAS' identity, they are not entitled to have the judgment set aside on that ground.

Plaintiffs' also claim that IAS representative David Terry's testimony at trial conflicted with Exhibit "B." First, not every discrepancy in testimony rises to the level of fraud. *See*

Washington v. Patlis, 916 F.2d 1036, 1039 (5th Cir. 1990)(holding conflicting testimony does not constitute clear and convincing evidence of fraud under 60(b)(3)). Second, Plaintiffs were free to present that conflicting information to the jury and have the jury interpret the meaning of the conflict. *See Id.* Plaintiffs' attorney could easily have shown Exhibit "B" to the jury and reminded the jury of David Terry's testimony, and argued that this information was confusing. Plaintiffs are apparently unhappy because they only picked up on the alleged conflict between David Terry's testimony and Exhibit "B" at trial. They, however, likely would have heard David Terry's explanation before trial, if they had bothered to depose him.

Finally, it is unclear why this alleged confusion is even relevant. IAS stipulated as to who was the proper party to the litigation. IAS didn't escape from the judgment because of a misnomer in the complaint, and Plaintiffs were not prevented from putting on any evidence of liability because of this alleged confusion. The entire matter is a red herring. Unless the alleged fraud is materially related to a submitted issue, it is not grounds for setting aside a judgment. *See MCI Telecommunications Corp.* 171 F.R.D. at 9.

3. It was not an abuse of discretion to refuse to set aside the judgment because of a delay in producing the recap notes since it is undisputed that Plaintiffs had the recap notes almost a year before trial.

Plaintiffs admit they had the recap notes prior to trial, because defense experts provided them. (R. Vol. 56, p. 0013) In fact, the expert files were first produced to Plaintiffs almost a year before trial. (See Exhibit "B" to Amica's Response to

Plaintiff's Motion to Set Aside the Judgment). A movant may not prevail on a 60(b)(3) motion when he had access to the information. *Ojeda-Toro v. Rivera-Mendez*, 853 F.2d at 29. Thus, evidence which Plaintiffs had for more than a year before trial cannot serve as a basis for setting aside a judgment.

Plaintiffs' complaint about the recap notes is that his experts did not have them when filing their report. This complaint is without merit. Plaintiffs' expert Robert Lazarus filed a supplemental expert report on Jan. 7, 1998 in which he discussed the recap notes. (See Exhibit "C" to Amica's Response to Plaintiff's Motion to Set Aside the Judgment). This supplemental report was filed more than eight months before trial. Thus, the alleged delay in producing the recap notes did not hinder Plaintiffs' trial preparation.

4. It was not an abuse of discretion to refuse to set aside the judgment because AMICA failed to produce documents showing that Plaintiffs wanted their furniture 100% germ free, as there is no evidence that such documents exist.

Plaintiffs produced no evidence that AMICA has documents reflecting that Plaintiff wanted his furniture 100% germ free. Unless AMICA had such documents in its possession, custody and control, it was not obligated to produce the documents. Fed. R. Civ. P. 34.

Moreover, Plaintiffs produced no evidence that they made any discovery requests that encompassed such documents, if they exist. The Plaintiffs complained that defense witnesses testified that Janik wanted his furniture 100% germ free (T. Vol. 6, 30). The testimony of the defense witnesses, however,

appears to be based on anecdotal information exchanged among the various defense witnesses. No one testified that Plaintiffs made a written request that the furniture be 100% germ free. Plaintiffs might have been justified in objecting to this testimony as hearsay, or otherwise impeaching the testimony, but they are not entitled to have the judgment set aside based on the testimony. Moreover, they possibly would not have been surprised by the testimony if they had ever bothered to take the deposition of a defense witness prior to trial. Finally, Plaintiffs conceded they were able to dispute this information by presenting their own evidence to the jury that Plaintiffs wanted the materials cleaned to EPA standards. Thus, without more, Plaintiffs were certainly not entitled to, and the Fifth Circuit did not err by refusing, a new trial.

5. It was not an abuse of discretion to refuse to set aside the judgment because AMICA failed to produce documents regarding generally acceptable claims handling practices or documents that demonstrated that it routinely gave the benefit of the doubt to the insured, as there is no evidence that such documents exist.

Plaintiffs produced no evidence that AMICA had documents regarding generally acceptable claims handling procedures in its possession, custody or control. Unless AMICA had such documents in its possession, custody and control it was not obligated to produce the documents. Fed. R. Civ. P. 34(c). Although Amica's expert Ken Shumaker testified regarding generally accepted claims handling procedures, his testimony indicates that the basis for this testimony was his many years in the insurance industry. (T. Vol. 6, p. 234-259).

Likewise, a review of the testimony from witnesses that Amica routinely gave the benefit of the doubt to its insureds seems to be based on the witnesses experience in the industry and not on any written document that they reviewed. (T. Vol. 6, p. 109-112).

6. It was not an abuse of discretion to refuse to set aside the judgment because a defense expert testified outside the scope of his report.

Assuming that the defense expert testified outside the scope of his expert report, then such testimony was improper. *See* Fed. R. Civ. P. 26(a). The remedy, however, is for Plaintiffs to move to have the testimony stricken. *See* Fed. R. Civ. Prac. 37(c). No authority exists for the proposition that testimony exceeding the scope of an expert report justifies setting aside a judgment.

7. It was not an abuse of discretion to deny Plaintiffs' motion to reconsider because the motion to reconsider to meet the required heavy burden to set aside a judgment.

Plaintiffs' Motion to Reconsider was devoid of any evidence showing that the trial court had abused its discretion in denying the Motion to Set Aside Judgment. Indeed, all of the evidence submitted in support of the Motion to Reconsider supports the trial court ruling.

Specifically, with regards to their complaints that Amica withheld information that it was number one in consumer satisfaction, Plaintiffs claim they were damaged by this lack of

disclosure because as a result, they fail to used Plaintiffs Ex. 431, 432 and 433 which allegedly involved thousands of pages of complaints against Amica. (PL. R. Ex. 2, tab H, p. 8). Plaintiffs admit that they had the impeachment evidence ready and available at trial. It was simply because they chose to present other evidence, that they did not emphasize this evidence to the jury. It had nothing to do with any alleged withholding of material by Amica.

With regards to their complaints regarding the testimony that Amica always gave its insured the benefit of the doubt, that Plaintiffs wanted their furniture to be 100% germ free and Amica's claims-handling procedures, they failed to produce any evidence that written material to that effect existed as opposed to the testimony being based on the experience of the witness or anecdotal information.(PL. R. Ex. 2, tab H, p. 9, 10, 12).

8. It was not an abuse of discretion to refuse to set aside the judgment because the alleged withholding of the complained of material deprived Plaintiffs' of their constitutional right to trial by jury.

Plaintiffs argue they were deprived of a trial by jury because the alleged discovery abuse resulted in Amica receiving summary judgment on some of the causes of action asserted against Amica by Plaintiffs and in receiving a JNOV following trial on the merits.

First, Plaintiffs did not raise this below in their 60(b)(3) motion or the motion to reconsider and is therefore waived. *Cf. Williams Transportation v. Times Warner Operation, Inc.*, 98 F.3d 179, 183 (5th 1996)(refusing to review argument not raised in response to motion for summary judgment).

Second, Plaintiffs have already raised this issue in their brief filed in a previous appeal. Thus, this is an impermissible attempt at two bites of the apple. Moreover, if Plaintiffs felt evidence was being withheld that would have precluded summary judgment on those claims, they should have filed a motion for extension of time to respond to the summary judgment so that discovery could be conducted under Federal Rule of Civil Procedure 56(f). They still would have had to ask for the material and in most cases there is no evidence that they did so. In addition, the material still must exist before Amica would have an obligation to produce it.

It is unclear how this alleged material, if it existed, would have changed the partial summary judgment. Amica received summary judgment on Plaintiffs' causes of action for DTPA, coercion and duress, breach of fiduciary duty, breach of quasi contract and unconscionable conduct. Plaintiffs do not explain how any of the allegedly withheld material relates to any of these causes of action. To the extent that the recap notes might have affected Plaintiffs' defense to any of the summary judgment claims, it should be noted that AMICA did not receive partial summary judgment until June 1998. (R. Vol. 48, p.559). Plaintiffs had the recap notes in their possession for months by then, as their expert had filed a supplemental report on January 7, 1998, discussing the recap notes. (Exhibit "C" to Amica's Response to Plaintiff's Motion).

CONCLUSION

For the reasons stated, the Supreme Court of the United States should affirm the opinion of the United States Court of Appeals for the Fifth Circuit, and grant such further relief as is just.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

This is to certify that three true and correct copies of the foregoing instrument have been mailed via first-class mail to the following parties of record in compliance with this Court's rules on this 20th day of June, 2001:

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